Supreme Court, U. S.
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No. 79-1815

IN THE

Supreme Court of the United States

October Term 1980.

DR. LEON SALOB,

Petitioner,

against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

Reply Brief for Petitioner in Support of Petition for Writ of Certiorari.

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

With respect to the respondent's brief and in replying to his point "As to the alleged Search" the constitutional issue was raised by a written timely motion at the hearing in the form of a motion to suppress all alleged contraband and alleged oral statements under the 4th and 5th Amendments to the U.S. Constitution but was considered improper under the Hearing Manual as no motions could be raised under said Manual instructions to the Hearing Boards.

In this case not one patient testified against Doctor Salob and the sole witness against him was a state investigator who entered his office located in his home without a warrant for any violation on three separate occasions, May 2, May 19 and June 2, 1978, and whose unconsented entry without showing of any exigent circumstances, into the outer office and inner office and the seizure of pamphlets, booklets and an alleged X-ray—the crux of the case which was impossible of identification as a Hodge Podge as testified to by the expert in radiology for over 40 years Doctor Sheldon, for the defense and uncontradicted by the State Investigator who identified said sole X-ray upon information and belief. Further as the sole witness he changed his story several times.

In *Mapp vs. Ohio,* 367 U. S. 643, 655, the Supreme Court of the United States said, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State Court." *No distinction is made between the admissibility of such evidence in civil and criminal cases.* The *Mapp* decision applying the 4th Amendment is applicable here since its impact is on the govenmental seizure only.

The New York State Courts in the case at bar apparently did not recognize the decision of *Finn's Liquor Shop vs. State Liquor Authority,* 24 N. Y. 2d 647, holding that "no state may require as a condition of doing business, a blanket submission to warrantless searches at any time for any purposes * * * and *same applies to administrative proceedings.*"

The *Finn* case cites a number of cases in the State of New York which holds to this principle regarding administrative proceedings and at page 654 stated:

"It is no longer subject to question that state agencies charged with purely administrative responsibilities just as those engaged in the enforcement of Criminal law must conduct their investigative and enforcement functions in compliance with constitutional requirements and more particularly within the confines of the 4th Amendment (see *Camara vs. Municipal Ct.*, 387 U. S. 523a, 30-531); *See vs. City of Seattle,* 387 U. S. 54.

Page 655:

"The authority just as any other state agency is obligated to conduct its activities in conformity with the demands of the constitution. When its agents exceed those limits it should not be permitted to avail itself of the fruits of such unlawful activity in order to impose sanctions upon the persons whose constitutional rights have been violated."

Marshall vs. Barlow, 98 S. Ct. 1816;
Camara vs. Municipal Court, 387 U. S. 523, 528.

"The business man (the professional) like the occupant of a residence has a constitutional right to go about his business free from unreasonable official entries upon his private property."

The *Katz* case re-emphasized the *necessity of securing a warrant* to seize matters alleged to be incriminating.

Katz vs. U. S., 387 U. S. 357:

"Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, *United States vs.*

> *Jeffers,* 342 U. S. 48, 51, and that searches conducted outside the judicial process without prior approval by Judge or Magistrate, are per se unreasonable under the Fourth Amendment.
>
> "Reversed for failure to obtain a warrant."

The *Katz* case went further and stated (pages 356, 357):

> "In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionable showing probable cause.' *Agnello vs. U. S.,* 269 U. S. 20, 33."

The *Lewis vs. United States,* 385 U. S. 206, 211, page 211:

> "A government agent in the same manner as a private person may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course this does not mean that whenever entry is obtained by invitation and the locus is authorized to conduct a general search for incriminating material a citation to the *Gouled* case, *supra,* is sufficient to dispose of that contention."

James Otis in his speech on February 24, 1761, in speaking against writs of assistance empowering search of Merchants at any time of night said "Custom house officers may enter our houses when any please * * * and whether they break through malice or revenge no man no court can inquire. Bare suspicion without oath is sufficient * * *.

What a scene does this open. Every man prompted by revenge, ill humor or wantonness to inspect the inside of the neighbor's House may get a writ of assistance; others will ask it from self defense. One arbitrary exertion will provoke another until society be involved in tumult and in blood * * *." (Treasury of the World's Greatest Speeches—Houston Peters—page 117.)

A letter of an alleged complaint about a sign of an unknown person initiated the specifications against Doctor Salob. A warrant, administrative or otherwise was never secured between May 2nd, May 19th and June 2nd, 1978, or any other time and thus moved from the realm of administrative search to criminal investigation by the alleged three times that the state investigator came to the office thereby necessitating strict adherence to Fourth Amendment proscription as the *"Abruzzi"* case herein cited sets forth.

Apparently the New York State Courts did not recognize another of their decisions in *People vs. Doctor Abruzzi,* 52 A. D. 2d 499, affirmed at 42 N. Y. 2d 813, suppressing all tangible and oral statements because of failure by the Police to obtain a warrant.

> "We first note that whether the Police have conducted a search within the meaning of the 4th Amendment depends not upon a property right in the invaded place but upon whether the area is one in which there is a reasonable expectation of freedom from governmental intrusion (*Katz vs. United States,* 389 U. S. 347, 352). Undoubtedly a doctor's office is such an area (*Mancusi vs. DeForte,* 392 U. S. 369). Consequently the failure by the Police to obtain a search warrant cannot be lightly excused (see *Coolidge vs. New Hampshire,* 403 U. S. 443, 444).

Dr. Salob did not testify in this case so that illegal evidence could not have been introduced against him and further the Fourth Amendment and the Fifth come into play when the accused is "the unwilling source of the evidence" (*Gouled vs. United States,* 255 U. S. 298), there being no difference "whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises."

The respondent cites *Lewis vs. United States,* 385 U. S. 206, as supporting their contentions however not only is the subject matter different, narcotics, but the circumstances of *privilege and confidential communication* are involved, between a doctor and his patient. Absent any waiver of physician-patient relationship as Doctor Salob did not take the stand or testify, under 4504 of the Civil Practice Act of the State of New York it is not expressly required that the communication or information be confidential in order to be protected. There was no waiver by Doctor Salob and of any patient-doctor relationship and any alleged documentary evidence of the sole witness and his testimony should have been suppressed upon this further grounds.

The respondent at page 5 cites *Harris vs. United States,* 390 U. S. 234, which deals with a police officer's right to search cars and seize evidence in plain view after the car had been impounded as evidence in a robbery. Neither this case nor the *Lewis* case at page 4 as cited gives rise to the proposition that when petitioner invites the public to enter his professional office, even when that office is in his home, he must assume that agents of the licensing authority might also enter to check his compliance with the law. In neither case was there an entry into professional man's premises or the doctor-patient relationship. *Air Pollution Variance Board vs. Western Alfalfa Corp.,* 416

U. S. 861, is an environmental case dealing with smoke and emission and the objection was not to taking picture of a sign alleged to be over the home of Doctor Salob, but the subsequent actions thereafter to attempt to secure incriminating evidence thereafter at three (3) separate visits without a warrant and not inquiring whether said sign was a referral sign.

In the *Matter of Erdman vs. Ingraham,* 28 A. D. 2d 5 (1st Dept. 1967), cited by the respondent the Appellate Division, First Department, of the City of New York saw fit to remand the matter to the commissioner for rehearing and reconsideration on the grounds that the petitioner was deprived of the right to cross-examine witnesses who had given statements to the investigator and which statements were part of the record and that such hearsay had a harmful and unfair effect.

The "no rules of evidence" under 6510(2)B of the New York State Education Laws leaves too much to the discretion of the Hearing Board to make lopsided rulings and ignore privilege, relevancy and its admissibility, irrelevant evidence, competency of witnesses, lack of personal knowledge, exclusion of relevant evidence on grounds of prejudice, confusion or waste of time, *res gestae* prior inconsistent statement, competency of Judges or referees to testify at the same trial they are presiding over, character evidence, hearsay and exception to the hearsay rules, etc.

This statute is constitutionally infirmed in that it does not afford procedural protections to the accused at the heart of the case. The hearing, admissibility and inadmissible evidence based upon rules of evidence, constitutional rights and civil rights. Without procedural safeguards and adequate standards fundamental constitutional rights are destroyed.

See

Marcus vs. Search Warrant, 367 U. S. 717.

Further overbreadth is fatal to this statute. There are no limitations and shifts the burden of proof in this civil proceeding to the accused for example when it denied the rebuttal evidence offered by the defense through its radiologist expert that the single X-ray offered by the Prosecutor was no identification of the body of the investigator or his dental work repudiating the prior entire Board's contention that it was and then eight months later demanding a comparative X-ray with the "Hodge Podge" X-ray offered in evidence. This is certainly not equal protection of the laws when the Board upholds its own decision on X-rays.

This standard of substantial legal proof is meaningless, when there are no rules of evidence. These decisions regarding constitutional guarantees are left by default to administrators who lack the power to rule upon constitutional questions and the Supreme Court has recognized repeatedly that a man is free to follow his chosen profession from unreasonable governmental interference and which comes within the liberty and property concepts of the fifth amendment.

The question of the *no rules of evidence* 6510 2B which has been challenged as unconstitutional by Dr. Salob in his brief to the Appellate Division, Third Department, State of New York, remained unanswered in its decision, stating it was a question of fact for resolution by the triers of fact, and in particular, stated that the X-ray of the investigator raised a fact question, and then concluded that the X-ray was properly ruled admissible. Can there be substantial legal evidence if there are no rules of evidence? Can there be legal evidence without the rules of evidence and the

U. S. Constitution applying to such evidence? Is there not a contradictory phrase herein used to propagate evidence which is neither substantial nor legal? The *no rules of evidence* permitted the admissibility of the X-ray which was unidentified, was loosely thrown into an evidence locker, not logged, not sealed, nor was there any way of knowing whose X-ray it was, where it was made, and when it was made. The X-ray was admitted into evidence because of no rule of evidence applicable to this type of hearing to determine the revocation or suspension of a license of a professional person and is hereby challenged as conjectural, speculative, incompetent. As to its constitutionality under the 6th amendment of the U. S. Constitution, the rules of evidence would have demanded proof of continuity of possession, proof of no alteration, proof of no tampering, but crucially important as well, no testimony was offered by the prosecution to show the authentication and interpretation of the X-ray.

Everything and anything from hearsay gossip and rumors can be poured into a hearing to deprive a man of his professional life or partial destruction thereof. The Bill of Rights does say that certain things shall not be done. And so the question here is not what the government must give, but rather what it may not take away especially in the light of this flaky and flimsy case against the petitioner.

The fact that a Board is selected to hear the case and the accused at the hearing has no right to select the members of the Board nor its chairman demonstrates implied bias if not actual bias from the outset of the proceedings. He is denied a Jury trial, given a stacked deck, and in the case at bar was not tried by his peers in that one of the Voting Hearing members was a PHD, not a chiropractor. The actual bias occurred in this case when the Hearing Board unanimously affirmed its own prior decision that the

single X-ray was a proper identification of the investigator's dental work and body without another X-ray to compare. This was a demonstration of bias against the accused. Further in the case at bar the Hearing Board did permit the investigator on an alleged re-direct examination to read freely from his alleged memorandum with no past recollection of the event, destroyed further cross examination and the right to an impartial hearing.

The equal protection clause of the Constitution under the 14th Amendment and the privileges and immunities clause is guaranteed to all citizens of the several States under our constitutional Government and the defense therein is the essential meaning of our Constitution, Bill of Rights and Civil Rights.

Constitutional rights should not be abrogated by a default in admininstrative hearings.

Respectfully submitted,

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